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In The

Supreme Court of the United States

October Term, 1994

BURLINGTON NORTHERN RAILROAD COMPANY,

Petitioner,

v.

RAILWAY LABOR EXECUTIVES' ASSOCIATION, ET AL.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals District Of Columbia Circuit

REPLY BRIEF OF BURLINGTON NORTHERN RAILROAD COMPANY

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The Solicitor General for the National Mediation Board ("NMB or Board") has asked this Court to deny the Petition for Writ of *Certiorari* filed by Burlington Northern Railroad Company ("BN").[1] The arguments presented

[1] The Solicitor General has similarly asked that the Court deny the Petition filed by the National Railway Labor Conference.

do not support denial of the Writ of *Certiorari*. *See* Opposition at 10-13. Because there is no other opposition to BN's Petition,[2] this Court should grant the Petition.

1. The principal argument presented by the Solicitor General is that though the divided *en banc* court of appeals was wrong in holding that the NMB's *Merger Procedures* violated the Railway Labor Act ("RLA"), 45 U.S.C. § 151 *et seq.*, this Court should not grant the Petition because the Board is contemplating "alternative ways to address" merger-related representation disputes. Opposition at 11. This argument presents a conundrum. Without any specificity about the "alternative ways" and without any public pronouncement by the Board stating that it was exploring such "alternative ways" and describing them, we are left with an indefinite delay to the resolution of an important representation dispute and with an erroneous court of appeals' decision adversely affecting the proper administration of the RLA. This argument thus runs headlong into previous representations by the Board and the Justice Department and thus should be afforded little weight.

Earlier in this case, Justice forcefully argued that this case "is of great legal significance" and has many adverse practical effects. Petition for Rehearing with Suggestions for Rehearing En Banc of the National Mediation Board at 3. Those practical problems were that the 2-1 court of appeals' panel decision "unsettles numerous bargaining relationships . . . in the railroad industry since . . . 1989

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[2] The labor organizations which are the plaintiffs below have waived their right to respond.

and . . . in the airline industry . . . since 1987." NMB Rehearing Petition at 3. While the NMB *Merger Procedures* "promote stability in labor relations (citation omitted)," the divided panel decision finding that the *Merger Procedures* violated the RLA "require[d] the return to certifications which are **necessarily** inconsistent with the right of . . . the employees to determine their representatives." NMB Rehearing Petition at 3-4. The significance of this case and practical problems resulting from the *Merger Procedures* being struck down have been only exacerbated by the 5-4 D.C. Circuit's *en banc* decision. These unspecified "alternative ways" provide little comfort for the entire airline and rail industries that must face the destabilizing labor relations problems created by an erroneous court of appeals' decision. Opposition at 11. Not only are these illusive alternatives an insufficient reason to deny BN's Petition but they also fly in the face of the earlier positions argued by Justice. The divided *en banc* D.C. Circuit's decision leaves the airline and rail industries subject to potential disruptions to interstate commerce and meaningless collective bargaining. In particular, BN, along with the rest of the rail industry, is locked in a battle with certain labor organizations over who is the representative for collective bargaining for a particular craft on each railroad and that dispute has stalled the current round of bargaining. The court of appeals' decision can only result in further litigation and the prospect of interruptions to commerce. The position of the Solicitor General would leave the parties and the public in such an intolerable position.

2. Although the Solicitor General disagrees with the *en banc* court of appeals' decision that the *Merger Procedures* violate the RLA, there is no substantive legal justification given as to why this Court's review is not warranted. Opposition at 11. The Solicitor General offers no basis for this Court to conclude that the Board's consideration of "alternative ways" provide a legally sustainable way out of the difficulties created by the 5-4 D.C. Circuit's decision.[3] Without such assurance, the "alternative ways" would only face additional challenge by the labor organizations. Representation disputes would once again be dragged through "other tribunals of law"; "the haggling and delays of litigation" would not be avoided. *Brotherhood of Ry. Clerks v. Association for the Benefit of Non-Contract Employees*, 380 U.S. 650, 671 (1965) (*"Railway Clerks"*); *Switchmen's Union of N. Am. v. National Mediation Bd.*, 320 U.S. 297, 305 (1943) (*"Switchmen's Union"*). Only this Court's review would bring an end to the delay.

3. The Solicitor General tries to diminish the conflict between the sharply divided *en banc* D.C. Circuit's decision on reviewability of the Board's representation procedures and this Court's decisions on a lack of judicial review. Opposition at 11-12. But in so doing, the Solicitor

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[3] It is not a legally sufficient basis for the Solicitor General to imply that because BN does not argue that there is a right under the RLA for a carrier to invoke the Board's services under § 2 Ninth, that the Board's "alternative ways" may solve the issue presented here. Opposition at 12. The Solicitor General flatly misses the issue. It is not whether the carrier has a right to invoke the Board's services under § 2 Ninth, but whether the Board has the discretion to investigate under § 2 Ninth a certification if the employees have not invoked the Board's services.

General highlights the reason for this Court's consideration. Though the decisional law was largely static and predictable with respect to a lack of involvement by the courts in the Board's handling of representation matters, the 5-4 D.C. Circuit's decision turns that law topsy-turvy and encourages more court involvement. Confusion now will exist as to the appropriate standard of judicial review for the Board's representation procedures. Indeed, the Solicitor General's view of the divided D.C. Circuit's decision creates further confusion: "[t]o the extent that the court of appeals relied upon *Leedom v. Kyne* . . . " Opposition at 10. That statement does not offer much reassurance as to what standard of judicial review the court of appeals used to overturn the Board's representation procedures. Further, this Court's decisions in *Switchmen's Union* and *Railway Clerks* have long governed the lack of judicial review of the Board's handling of representation matters. The sharply-divided court of appeals' decision allows the lower courts to select the level of scrutiny that a particular court wishes to employ: the court could chose either 1) *Leedom v. Kyne*, 358 U.S. 184 (1958), or 2) Administrative Procedures Act, 5 U.S.C. § 704 (1988), or 3) the "no judicial review standard" of *Switchmens' Union* and *Railway Clerks*. This Court's grant of the Writ of *Certiorari* could ensure predictability as to the standard of judicial review. That predictability would discourage the parties from undertaking what surely will be a new round of litigation that tests the Board's treatment of representation matters. This is precisely the opposite of the result intended by Congress. *See Railway Clerks*, 380 U.S. at 671.

4. Finally, the Sixth Circuit's decision in *Brotherhood of Maintenance of Way Employes v. Grand Trunk Western Railroad*, 961 F.2d 1245 (6th Cir. 1992), conflicts with the 5-4 *en banc* D.C. Circuit's decision, notwithstanding the views of the Solicitor General. The Sixth Circuit was told that Grand Trunk both petitioned the Board under the *Merger Procedures* for resolution of merger-related representation disputes, and sought clarification from the Board over its decision resolving such disputes. 961 F.2d at 1249. The court of appeals delayed making a decision until the Board acted upon the Grand Trunk's clarification request. 961 F.2d at 1249. After receiving the Board's clarification, the court stated, "we conclude that the Board correctly determined that the matter presented to it in this case [by Grand Trunk] was a representation dispute . . . . " 961 F.2d at 1250. The Sixth Circuit's decision stands in stark contrast to the divided D.C. Circuit's decision here: "The inescapable conclusion from the plain language of Section 2 Ninth, therefore, is that Congress intended neither carriers nor the Board to initiate representation proceedings." BN's Petition App. at 24a. Only this Court's grant of the Writ of *Certiorari* can resolve the conflict.

CONCLUSION

Notwithstanding the views of the Solicitor General, for the reasons set forth above and in the Petition, the Writ of *Certiorari* should issue and the decision of the *en banc* United States Court of Appeals for the District of Columbia should be reversed.

Respectfully submitted,

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